

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Winstar Communications, LLC
Emergency Petition for Declaratory Ruling
Regarding ILEC Obligations to
Continue Providing Services

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WC Docket No. 02- 80

**EMERGENCY PETITION FOR DECLARATORY RULING OF
WINSTAR COMMUNICATIONS, LLC**

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April 17, 2002

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Dear Mssrs. Carlisle & Cooke,

Enclosed please find the Emergency Petition for Declaratory Ruling of Winstar Communications, LLC (Winstar), filed today at the Federal Communications Commission.

Winstar plans to also file a Federal U.S. District Court action tomorrow seeking enforcement of Sections 401(b) and 406 of the Communications Act.

Winstar seeks the requested relief in order to prevent the threatened disconnection of services in violation of the Act.

Best regards,



Joseph M. Sandri, Jr.
Senior Vice President
& Regulatory Counsel

Encl.

Cc: Commissioner Kathleen Q. Abernathy
Matthew Brill
Kyle Dixon
Dan Gonzalez
Jordan Goldstein

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. BACKGROUND.....	3
III. LEGAL BASIS.....	8
A. Unreasonableness Under Section 201 and 251.....	9
1. The Threatened Action Would Disrupt Service To Customers In Violation Of Commission Rules And Policies.....	10
2. The RBOCs' Threatened Action Also Undermines Local Competition.	13
B. Section 202(a) Violations.	14
C. Section 203 Violations.....	17
IV. CONCLUSION	18

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Winstar Communications, LLC, ("IDT Winstar") files this Emergency Petition for Declaratory Ruling pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2 (2001), and Section 554(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), to terminate a controversy and provide certainty.

I. INTRODUCTION

IDT Winstar and its customers are confronted by immediate threats from Verizon and Qwest (collectively, "RBOCs") to deny or delay provisioning of facilities and services that the RBOCs control. In addition, although this petition directly addresses threats made by Verizon and Qwest, other similarly situated carriers may take similar action. Therefore, IDT Winstar respectfully requests a ruling that would prevent any similarly situated incumbent carrier from denying or delaying the provisioning of facilities and services under its control to IDT Winstar.¹

¹ Specifically, although SBC and BellSouth have not explicitly threatened IDT Winstar with service cut-offs, both companies have participated in the Winstar bankruptcy proceedings and have taken legal positions there comparable to Verizon and Qwest.

The facilities and services at issue are necessary for the offering and receipt of IDT Winstar's services. These facilities and services must be provided to IDT Winstar pursuant to the requirements of the Communications Act and the Commission's Rules. However, unless the Commission intervenes and orders the RBOCs to meet their obligations under federal law, thousands of customers will be without local exchange and long distance telephone service, data transmission, and Internet access service.

The circumstances surrounding the RBOCs' threat to deny or delay provisioning to a competitor are unusual and highly aggravated. The facilities and services are in place. No measurable effort or expenditure is required to make them available. Any denial or delay in provisioning would constitute an act of monopolization of the crudest sort. Nevertheless, the RBOCs are threatening explicitly to cause a provisioning "blackout" during which "there will be no service to New Winstar"² and "end users may suffer service interruptions."³ To engage in their threatened activity, the RBOCs would have to undertake measures that would cost them money in the form of unnecessary expenditures and foregone revenues. In other words, they would have to behave in ways that are completely irrational in the absence of an ulterior motive. The RBOCs have raised an utterly transparent artifice in an effort to evade their undoubted responsibility to provide the facilities and services IDT Winstar has ordered. These threatened

² *In re: Emergency Joint Application for Approval of Assignment of Assets and AAV/ALEC Certificate No. 4025 and IXC Certificate No. 2699 from Winstar Wireless, Inc. to Winstar Communications, LLC*, Docket No. 020054-TP, Verizon Florida Inc.'s Petition Protesting Proposed Agency Action Order Approving Assignment of Assets and Alternative Local Exchange Telecommunications and Interexchange Telecommunications Certificates, at 2 (filed April 2, 2002)("Verizon Florida Petition") (attached as Exhibit 1).

³ *Application of Winstar Communications, LLC for an Amendment to Its Service Provider Certificate of Operating Authority*, Docket No. 25622, Verizon Southwest's Motion to Intervene, at 1 (filed April 10, 2002)("Verizon Southwest Motion to Intervene") (attached as Exhibit 2).

actions, once again as so often in the past, impose upon the Commission the obligation to deter the RBOCs' attempt to wield their monopolies in impermissible ways.

II. BACKGROUND

Winstar Wireless, Inc. ("Old Winstar") filed for bankruptcy on April 18, 2001. By December, 2001, it became apparent that Old Winstar would not be able to reorganize and emerge from bankruptcy. In late December, IDT Winstar's parent, Winstar Holdings, offered to purchase the assets and customers of Old Winstar and the Bankruptcy Court entered a Sale Order accepting the offer.⁴ On January 10, 2002, corresponding assignment applications were filed with the Commission.⁵ They were placed on Public Notice on January 16, 2002.⁶ No petitions or comments were received in response to the Public Notice.

The Public Interest section of the assignment applications describes many of the efforts that have been made to protect all Old Winstar customers from disruption of service. In the normal course, these efforts and the Commission's discontinuance requirements would have been sufficient to permit customers to choose the carrier or carriers on which they would rely for future service without undue risk that they would find themselves without service.⁷ Among

⁴ *In re: Winstar Communications, Inc. et al.*, Order Authorizing (i) Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (ii) Approving Cure Amounts with Respect to Certain Executory Contracts and Unexpired Leases, (iii) Authorizing the Debtors to Enter into and Approving Management Agreement, (iv) Approving Regulatory Transition Process and (v) Granting Related Relief, Case No.: 01-1430 (JJF) (Dec. 19, 2001) ("Sale Order") (attached as Exhibit 3).

⁵ Application of WWI License Holding, Inc. (Debtor-in-Possession), File No. 0000721675; Application of Winstar LMDS, LLC (Debtor-in-Possession), FCC File No. 0000721683; Application of Winstar Puerto Rico, Inc., File No. 0000721625; Application of Winstar Wireless Fiber Corp. (Debtor-in-Possession), File No. 0000723317 (filed Jan. 10, 2002).

⁶ Public Notice, *Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Accepted for Filing*, Rep. No. 1077 (rel. Jan. 16, 2002).

⁷ The discontinuance process affords both notice and time to permit customers affected by a carrier's bankruptcy to make an informed election of new carrier and to arrange for new service. See *In re Policy and Rules Concerning Rates For Competitive Common Carrier Services and Facilities Authorizations*

other things, the Sale Order specifies a process designed to avoid disruption of service to those customers that chose to subscribe to the services that IDT Winstar--once the necessary federal and state regulatory approvals were secured--would offer. The Sale Order process protects the interests of the RBOCs by assuring that their underlying services are paid for in advance, on a weekly basis, during the interim. Thus, between the discontinuance procedures adopted pursuant to Section 214 and the Sale Order, communications customers should have been well protected. That there is any doubt as to the continued provision of service to customers is solely a function of the RBOCs' threats to engage in unlawful delay or denial of the facilities and related services provisioning required by the Communications Act.

The important facts are few and indisputable. The facilities and services to be "provisioned" are already in place. No additional installation or connection is needed. And, the facilities and services to be "provisioned" are being paid for until IDT Winstar secures the regulatory approvals--principally in the form of the FCC licenses and state certificates and successful completion of the discontinuance process--necessary for it to serve the customers that have chosen to do business with it.

Thousands of Old Winstar subscribers have chosen to become customers of IDT Winstar. In addition to the approximately 7,500 lines that serve over 50,000 government telephone numbers, IDT Winstar will serve thousands of commercial customers. The government customers include users in the Air Force; the Army; the Bureau of Alcohol, Tobacco and Firearms; the Coast Guard; the Customs Service; the Department of Defense; the Department of Justice; the Federal Aviation Administration; the Federal Bureau of Investigation; the General

Therefore, 85 FCC 2d 1, ¶ 147 (1980) ("We believe that Section 63.71 strikes a good balance between the need to reduce regulatory barriers to exit from competitive markets and our responsibility to ensure that the public served will be given a reasonable period of time to make other service arrangements.").

Services Agency; federal courthouses, the Marshals Service; and many other agencies. The commercial customers, who outnumber the government customers, run the full gamut of business related activities, and include medical facilities, schools, police and sheriff departments, municipal governments, banks, and brokerage firms.⁸

Notwithstanding this state of affairs, the RBOCs have contrived a wholly artificial problem that threatens real harm to customers. The RBOCs claim that unless IDT Winstar assumes the debts of the bankrupt Old Winstar, they will disconnect the circuits and other facilities of the customers wishing to employ IDT Winstar as their carrier going forward and only reconnect them in the fullness of time. There are two apparent motives for this position, both improper. First, it is an effort to secure--in fact, extort--from the regulatory process payment of Old Winstar's debts by IDT Winstar. Second, it is an effort to injure or destroy a potential commercial rival.

A refusal to deal is the most serious threat a dominant firm can make. The RBOCs have articulated and employed it repeatedly, sometimes in outright refusals to interconnect and to provide other essential facilities to rivals and sometimes in the superficially different form of delayed or degraded provisioning.

What is being threatened here is the tearing down of existing circuitry and an unspecified delay in putting it back up, notwithstanding that proper requests for the facilities and related services have been made. The RBOCs apparently would justify the refusal to provide the existing facilities and services to IDT Winstar and its prospective customers on the sophistry that these circuits must be held available for other uses and committed to IDT Winstar and its

⁸ See *In Re Winstar Communications, Inc.*, No. 01-1430 (Bankr. D. Del.), Declaration of Jerry W. Hogge in Support of Motion by Winstar Holdings, LLC to Enforce Injunction Against Stopping Service to the Debtors Before the Cutoff Date, dated April 17, 2002 ("Hogge Dec.") (attached as Exhibit 4).

customers only when they reach the head of an alleged queue. Unless, of course, IDT Winstar would agree to pay the RBOCs the sums owed by Old Winstar, in which case concerns about holding the circuits available for others would be forgotten. A by-product of IDT Winstar's payment to the RBOCs of an unrelated party's debts would be the raising of a rival's costs, doubtlessly in the RBOCs' view an unavoidable consequence of avoiding the wait in the imaginary queue.

The RBOCs' proposition is well captured in Verizon state regulatory filings. An example from a recent filing with the Florida Public Service Commission:

If the current contracts and arrangements are not assumed and assigned, they will be cancelled. The circuits and other facilities used to provide those services will revert back to Verizon's inventory for use by other customers. If New Winstar places new orders or seeks new arrangements, those requests will be handled in order. During that time, there will be no service to New Winstar.⁹

This threat, in identical terms, also was made in a Verizon filing before the Maryland Public Service Commission.¹⁰ The language used by Verizon in its Motion to Intervene in IDT Winstar's certification proceeding in Texas is equally explicit with respect to the consequences for customers. It asserts that if IDT Winstar does not yield to the RBOCs' pressure to assume the obligations of Old Winstar and assign its contracts to itself, "they will be cancelled, and New

⁹ Verizon Florida Petition, Exhibit 1 at 2. *See Also* Verizon Southwest Motion to Intervene, at 1-2; *In the Matter of the Application of Winstar Wireless, Inc. and Winstar Communications, LLC for Authority to Discontinue Certain Telecommunications Services in the State of Maryland*, Opposition of Verizon Maryland, Inc. to Application of Winstar Wireless and Winstar Communications, LLC for Authority to Discontinue Certain Services in the State of Maryland, filed April 9, 2002 (attached as Exhibit 5)("Verizon Maryland Opposition"); *In re Winstar Communications, Inc. et al (Bankr. D. Del.)*, Objection of the Operating Telephone Company Subsidiaries of Verizon Communications Inc. to Trustee's Motion for Order Extending the Time Within Which the Trustee Must Assume or Reject Executory Contracts and Unexpired Leases Pursuant to 11 U.S.C. § 365 of the Bankruptcy Code Case No. 01-01430 (JCA) (filed April 11, 2002)(attached as Exhibit 6).

¹⁰ Verizon Maryland Opposition, at 2.

Winstar's end users may suffer service interruptions. This is because the circuits and facilities used to provide service will revert back to Verizon's inventory."¹¹

A recent Qwest Corporation filing in the Old Winstar bankruptcy proceeding could hardly be more inculpatory.¹² Qwest asks court approval to vacate the automatic bankruptcy stay to terminate the interconnection agreements under which it is providing service to Old Winstar. The eighteen-page pleading says in substance no fewer than five times that "the only party who could conceivably benefit from the Interconnection Agreements and be the assignee thereof is IDT, as the purchaser of the Debtors' business."¹³ Qwest also notes that rather than assume Old Winstar's interconnection agreements, IDT Winstar can "enter into new agreements with [Qwest]. However, in that case, IDT would stand in the shoes, not of the Debtors, but of any other carrier entering into its first agreements, with no special priorities, and no rights to use pre-established circuits and business practices."¹⁴ In other words, IDT Winstar should either agree to pay the RBOC-related debts of Old Winstar or the customers of IDT Winstar will be without service, notwithstanding that provisioning would take literally no time and no effort.

¹¹ Verizon Southwest Motion to Intervene, Exhibit 2 at 1.

¹² In re Winstar Communications, Inc. et al (Bankr. D. Del.), Objection of Qwest Corporation to the Chapter 7 Trustee's Motion for Order Extending the Time Within Which the Chapter 7 Trustee Must Assume or Reject Executory Contracts and Unexpired Leases Pursuant to 11 U.S.C. § 365 and Cross-Motion of Qwest Corporation for An Order Vacating the Automatic Stay Pursuant to Section 362(d) of the Bankruptcy Code to Authorize the Immediate Termination of Interconnection Agreements, Case No. 01-01430 (JCA)(filed April 11, 2002)("Qwest Objection and Cross-Motion") (attached as Exhibit 7). BellSouth joined in this filing. In re Winstar Communications, Inc. et al (Bankr. D. Del.), Objection of BellSouth Telecommunications, Inc. to Chapter 7 Trustee's Motion for Order Extending Time Within Which Trustee Must Assume or Reject, at 1, Case No. 01-01430 (JCA)(filed April 11, 2002) (attached as Exhibit 8).

¹³ Qwest Objection and Cross-Motion, Exhibit 7 at 3.

¹⁴ *Id.* at 8.

In Minnesota, Qwest moved to “clarify” or withdraw the interconnection agreement it entered into with IDT Winstar.¹⁵ There, Qwest explicitly stated that if IDT Winstar does not assume Old Winstar’s debt, “[f]acilities, circuits, etc. provisioned under the Old Winstar interconnection agreement will be terminated.”¹⁶ Like Verizon, Qwest acknowledges that IDT Winstar “can order new facilities and circuits under its new interconnection agreement.” but, alas, “the realities of the time it takes to provision these items (no different than for any new CLEC ordering new facilities and circuits) would inevitably lead, at least temporarily, to a discontinuance of service to Old Winstar’s customers that New Winstar might seek to serve in the future.”¹⁷

The disconnect and reconnect scenario the RBOCs have created is preposterous on its face--an exercise in cynicism tending toward satire--except that the consequences for customers and for what remains of local competition are serious. The scenario that the RBOCs are threatening to impose on IDT Winstar and its customers is also illegal. The Commission should declare it so, in order to deter serious violations of the Communications Act.

III. LEGAL BASIS

The RBOCs’ threats to deny and delay service to IDT Winstar are statements of their intentions to blatantly violate numerous provisions of the Communications Act, including Sections 201, 202, 203, and 251 of the Act. At the most basic level, the Act requires that the RBOCs’ provide services under just and reasonable terms, on a non-discriminatory basis, and in

¹⁵ *In the Matter of Qwest Corp. and Winstar Communications, LLC Adoption Letter for Previously Approved Interconnection Agreement*, Docket No. P421,5246/IC-02-324, Qwest’s Motion to Clarify or in the Alternative to Withdraw Joint Application (filed April 12, 2002) (“Qwest Minnesota Withdrawal Motion”) (attached as Exhibit 9).

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 2-3.

accordance with the terms of relevant tariffs. As explained in detail below, the RBOCs' intimidation efforts portend simultaneous violations of all three requirements.

A. Unreasonableness Under Section 201 and 251.

Section 201(a) unquestionably requires common carriers "to furnish such communication service *upon reasonable request*...."¹⁸ In construing Section 201(a) obligations, the Commission has repeatedly warned that

[it] expect[s] that carriers who are requested to provide service should make all efforts to do so, such as providing them under protest pending the resolution of complaints, petitions, or litigation, rather than refusing to meet a questionable obligation until after the complaint or litigation is resolved. Those who choose the course of non-compliance are on notice that they will be acting at their own peril, should the question of the legitimacy of their refusal to meet common carrier obligations be decided against them.¹⁹

Second, Section 201(b) states that "[a]ll ... practices ... for and in connection with such communication service, shall be just and reasonable, and any such ... practice ... that is unjust or unreasonable is ... unlawful."²⁰ Third, Section 251(c) establishes a clear obligation for ILECs to provide inputs to local exchange competitors on just, reasonable, and nondiscriminatory terms and conditions.²¹ Here, the RBOCs' threat is indeed a threat to unreasonably deny or delay the provision of service upon the reasonable request of IDT

¹⁸ 47 U.S.C. § 201(a) (emphasis added).

¹⁹ *Hawaiian Telephone Co.; Petition for Interconnection and the Provision of Communications Service*, 78 FCC 2d 1062, ¶ 9 (1980); see also *Elkhart Tel. Co. v. Southwestern Bell Tel. Co.*, 11 FCC Rcd 1051, ¶ 34 (1995); *AT&T Communications Apparent Liability for Forfeiture and Order to Show Cause*, Notice of Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd 1664, ¶ 11 (1995).

²⁰ 47 U.S.C. § 201(b).

²¹ See 47 U.S.C. §§ 251(c)(2), (c)(3), (c)(4) (requiring incumbent LECs to provide interconnection, unbundled network elements, and resale on just, reasonable, and nondiscriminatory terms and conditions).

Winstar in violation of Sections 201(a), 201(b), and 251(c) of the Act. As discussed below, the threat risks harm both to end users and to competition.

1. The Threatened Action Would Disrupt Service To Customers In Violation Of Commission Rules And Policies.

The RBOCs' threats, if carried out, would be contrary to fundamental Commission policy to avoid service disruptions to end-user customers, who would be most directly affected by the inability to place a simple phone call. Provisioning service in a manner that needlessly requires customers to be disconnected and reconnected defines the essence of unreasonableness.

The Commission's policy to require carriers to take steps to avoid service disruptions to end-users is manifest in FCC Orders and rules. The Communications Act itself contains the requirement that carriers file for authorization prior to discontinuing service.²² In carrying out its responsibilities to enforce the Act, the Commission requires all carriers to file for Commission authorization pursuant to Section 214 and its Part 63 rules prior to discontinuance. Carriers must individually notify all customers with adequate prior notice in order to ensure the customers' ability to obtain the same or comparable services from an alternative carrier.²³ Because of the importance the FCC places on avoiding service disruptions, these requirements apply to both dominant and non-dominant carriers alike.

Of particular importance here, the Commission has made explicit its expectation that "ILECs, in cooperation with CLECs and IXC's will work towards developing streamlined order processing systems to enable circuit migration to take place on a large-scale basis rather than

²² 47 U.S.C. § 214(a).

²³ See 47 C.F.R. § 63.60 *et seq.*

singly. Such streamlined order processing systems will avoid service disrupting 'disconnect and reconnect' scenarios with the attendant risks of failure and delay."²⁴ The Commission has further urged ILECs "[t]o minimize disruption to the end user, . . . [to] consider continuing to provide wholesale service to carriers seeking permission to discontinue service until a transition is made to a new provider, particularly when alternative providers have taken steps to migrate customers from the bankrupt carrier."²⁵ The RBOCs' behavior here reflects nothing but contempt for these Commission policies.

The Commission's concern for service disruptions is also evident in its rules and policies governing changes to a subscriber's carrier selection.²⁶ These rules are intended to protect consumers from fraudulent changes in pre-subscribed carriers by imposing the duty -- in most cases -- to obtain the individual authorization of the subscriber before changing the subscriber's chosen provider.²⁷ Recognizing that compliance with these rules could impose substantial burdens on carriers seeking to buy, sell, or transfer customer accounts, the Commission adopted a streamlined, self-certification process for carrier to carrier sale or transfer of subscriber bases.²⁸ The new process is "designed to ensure that the affected subscribers have adequate information about the carrier change in advance, that they are not financially harmed by the change, and that

²⁴ *Public Notice, Requirements for Carriers to Obtain Authority Before Discontinuing Service in Emergencies and Northpoint Communications, Inc. Authority to Discontinue Service*, 16 FCC Rcd. 10924, 10925 (2001).

²⁵ *Id.*

²⁶ 47 C.F.R. § 64.1100 *et seq.* ("slamming rules").

²⁷ 47 C.F.R. § 64.1120(c).

²⁸ *See 2000 Biennial Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, 16 FCC Rcd 11218 (2001).

they will experience a seamless transition of service from their original carrier to the acquiring carrier.”²⁹ Thus, the interest in an orderly transition of customers -- and the avoidance of discontinuance of service -- in carrier to carrier transactions justified special procedures to be followed in these instances.³⁰

In fact, the RBOCs’ threatened actions here would precisely violate the slamming rules. In compliance with the Commission’s slamming rules, IDT Winstar provided written notification to each of Old Winstar’s existing customers describing the sale of Old Winstar’s domestic voice and data business and assets to IDT Winstar and advising these customers that after transfer, IDT Winstar anticipated that it would begin providing them the telephone service previously provided by Old Winstar, unless the customer affirmatively chose to take service from another provider.³¹ Thus, those Winstar customers who did not affirmatively elect an alternative provider expect to be transferred to IDT Winstar pursuant to this letter. To assert that any action to discontinue service by an RBOC would undermine the intent of the slamming rules would be a gross understatement: the RBOCs’ threatened actions would eviscerate these rules. If RBOCs are permitted to disconnect service to IDT Winstar, these customers surely will not experience a “seamless transition” from Old Winstar to IDT Winstar, as they will be without any service.

²⁹ *Id.* ¶ 10.

³⁰ Under the prior rules, carriers typically requested waivers of the requirement for individual consent. Such waivers were routinely granted to “enable subscribers to experience a seamless transition of service when their original carrier ceases to be their service provider.” *Id.* ¶ 4.

³¹ Attachment A to Letter from Geoff Rochwarger, COO, Winstar Communications, LLC, to Magalie Roman Salas, Secretary, Federal Communications Commission, re CC Docket No. 00-257; Notification Regarding the Acquisition of Customers Pursuant to 47 C.F.R. § 64.1120 (filed Mar. 18, 2002) (attached as Exhibit 10).

2. The RBOCs' Threatened Action Also Undermines Local Competition.

While the RBOCs' misconduct directly threatens IDT Winstar's customers, the issues raised here extend more broadly. As the Commission is fully aware, many CLEC assets and services are in the process of being recapitalized, either reorganized or sold out of bankruptcy.³² This recapitalization and consolidation is the best hope that the societal investment in local competitive entry not be entirely lost. However, if the ILECs are permitted to preclude necessary restructuring, this investment will in fact be wasted. Even if the ILECs' misconduct does not totally prevent the rehabilitation of competitive assets, their conduct to date certainly succeeds in delaying their utility. Coupled with the customer disruptions, these competitive perturbations confirm the need for the Commission to declare the RBOCs' position illegal.

The threatened conduct in this case is particularly egregious because the statute does not tolerate an artifice such as the procedures threatened by the RBOCs. An artifice designed to raise rivals' costs is no more tolerated by the Act than an outright refusal to provide service upon reasonable request. The Act's obligations are straightforward. The RBOCs are required to provision service to IDT Winstar's customers without interruption of service.

³² See, e.g., *McLeodUSA Files for Bankruptcy*, Reuters (Jan. 31, 2002); Hilary Smith, *XO Restructuring Progresses With Bankruptcy Cloud Overhead*, RCR Wireless News, at 4 (Mar. 11, 2002); see Jonathan Stempel, *Telecom Bonds 2002: Hell, Purgatory and Heaven*, Reuters (Jan. 28, 2002); e.spire Communications, Inc., Press Release, *Bankruptcy Court Approves Sale of e.spire Internet Subsidiary to George F. Schmitt* (Jan. 9, 2002); *Network Plus Says Files Chapter 11*, Associated Press, (Feb. 5, 2002).

This situation is strikingly similar, in fact, to the Commission's decision that ILECs may not separate already-combined network elements before leasing them to a competitor.³³ As the Commission has explained, "[this requirement] is aimed at preventing [ILECs] from disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants."³⁴ In concluding that the Commission's policy was "entirely rational," the Supreme Court reasoned that "incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It was well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice."³⁵ In this parallel scheme, the RBOCs -- which intend to disconnect service to IDT Winstar's customers -- can only have anticompetitive motives to raise their rivals' costs without any offsetting gain in efficiency, in violation of the Act and Commission policy.

B. Section 202(a) Violations.

The RBOCs' bullying also presents a violation of Section 202(a) of the Act. Section 202(a) prohibits "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service...."³⁶ In

³³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 293 (1996) ("Local Competition Order").

³⁴ *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 395 (1999) (quoting Reply Brief for Federal Petitioners and Brief for Federal Cross - Respondents at 23).

³⁵ *Id.*

³⁶ 47 U.S.C. § 202(a); see also *Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993) ("The Congress's intention comprehensively to outlaw discrimination is apparent from the terms of the statute, which prohibits unreasonable discrimination not only in 'charges' but also in 'practices, classifications, regulations, facilities, or services ... directly or indirectly, by any means or device.'" (quoting 47 U.S.C. § 202(a)).

applying this provision, the Commission examines (1) whether two services are "like"; (2) whether there is disparate treatment by the carrier providing the service; and (3) whether such disparate treatment is unreasonable.³⁷ There is substantial evidence that the RBOCs' can and do transfer facilities and services reorganized under new ownership (out of bankruptcy or otherwise) without forcing a disconnect/reconnect service disruption. The RBOCs' contrary posturing here constitutes unlawful discrimination.³⁸

In comparable situations, Verizon and other ILECs have arranged for a smooth transition for customers required to switch carriers due to a discontinuance, without any apparent ruse of requiring a "disconnect/reconnect" arrangement. In numerous applications filed under Section 214(a), and specifically FCC Rule 63.71, discontinuing carriers were able to assure the Commission that discontinuance authority would be in the public interest because their customers would be returned to the ILEC without loss of service.³⁹ Although IDT Winstar lacks direct information as to the precise arrangements that were made in such cases, it is clear that customers were not forced to go without basic telecommunications services while the ILEC forced them to the back of the processing line.

³⁷ See *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990).

³⁸ In addition, Section 251(c) of the Act requires ILECs to provide unbundled network elements and resale services on a nondiscriminatory basis. Indeed, the Commission has held that the Section 251(c) prohibition of discrimination is a more stringent standard than Section 202(a). 47 U.S.C. § 251(c); *Local Competition Order* ¶ 217 ("We therefore conclude that Congress did not intend that the term 'nondiscriminatory' in the 1996 Act be synonymous with 'unjust and unreasonable discrimination' used in the 1934 Act, but rather, intended a more stringent standard.").

³⁹ See, e.g., Section 63.71 Application of Telergy, ¶¶ 7-8 and Ex. A (filed Nov. 26, 2001) (explaining that customers would be migrated to Verizon if they did not elect another carrier); Public Notice, Time Warner ResCom of New York, NSD File No. W-P-D-559, 2002 FCC LEXIS 534 (2002) (inviting comments on application and reciting applicant's assertion that it "has made arrangements with Verizon, the incumbent local exchange carrier (ILEC), to transfer the affected customers over to its network); Public Notice, Sprint Communications Company L.P., 16 FCC Rcd 22052 (2001) (inviting comments on applications and reciting Sprint's explanation that customers not making a new carrier election would be transferred to Verizon or SBC subject only to good credit standing).

This disparate treatment in transitioning customers from one carrier to another plainly constitutes unlawful discrimination under Section 202(a). The services involved in these cases and the instant one are "like" if not in fact identical -- providing for the transitioning of customers from one carrier to another. The treatment is clearly disparate, without any attempt to explain why the RBOCs' threatened treatment of IDT Winstar and its customers could or should reasonably differ from that provided itself (or for that matter, other CLECs where ILEC cooperation was needed).

Perhaps the most blatant instance of discrimination can be inferred from Verizon's spin-off of customers and assets to Genuity, as required as part of the Bell Atlantic-GTE merger.⁴⁰ There is no indication that either Genuity or its customers (transferred from GTE to the newly formed Genuity) suffered any such disruption of service arrangements in that transition. While the merger proceeding record is silent on this point, the new company Genuity was apparently able to continue taking special access and other Verizon local access services and facilities pursuant to relevant tariffs without the gamesmanship in evidence here.⁴¹ These Section 202 violations provide an additional basis for Commission action here.

⁴⁰ *In re Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd. 14032 (2000).

⁴¹ The merger proceeding reflects the filing of numerous contractual arrangements between Genuity and the merger parties but none appears to deal with ILEC tariffed services. There is also no discussion of the tariffed arrangements in the FCC Order.

C. Section 203 Violations.

Finally, the RBOCs' threatened course of action would violate Section 203.⁴² Pursuant to Section 203, the RBOCs must file tariffs with the Commission "for interstate and foreign wire or radio communication ... showing the classifications, practices, and regulations affecting such charges."⁴³ They are not allowed to deviate from the terms of the tariff.⁴⁴ Indeed, each RBOCs' federal access tariff includes a provision committing to its access customers that it "will provide to the customer, upon reasonable notice, services offered in this tariff at the specified rates and charges, to the extent that such services are or can be made available with reasonable effort...."⁴⁵ The RBOCs' threats to disconnect IDT Winstar's special access circuits are threats to deviate from the unambiguous terms of their tariffs requiring them to make reasonable effort upon reasonable notice to provide service. Given IDT Winstar's ongoing efforts to inform the RBOCs of the status of its orders, it should be beyond doubt that "reasonable effort" includes maintaining existing service to customers during an orderly transition.

⁴² Interstate special access circuits, such as those at issue in this Petition, are purchased out of interstate tariffs subject to Section 203, rather than interconnection agreements.

⁴³ 47 U.S.C. § 203(a).


⁴⁴ See *National Communications Ass'n, Inc. v. American Tel. & Tel. Co.*, 2001 WL 99856 (S.D.N.Y. 2001).

⁴⁵ Southwestern Bell Telephone Co., Tariff FCC No. 73, § 2.1.4(A) (effective Jan. 5, 2000); see also The Verizon Telephone Cos., Tariff FCC No. 1, § 2.1.4 (effective Apr. 28, 2001); The Verizon Telephone Cos., Tariff FCC No. 11, § 2.1.4 (effective Apr. 28, 2001); BellSouth Telecommunications, Inc., Tariff FCC No. 1, § 2.1.4 (effective Jan. 31, 1992); Qwest Corp., Tariff FCC No. 1, § 2.1.4 (effective Aug. 8, 2000).

IV. CONCLUSION

The Commission should declare that any actions undertaken by Verizon, Qwest or any other similarly situated incumbent local exchange carrier pursuant to the RBOCs' disconnect and reconnect scheme to deny or delay provisioning of facilities and related services to IDT Winstar and its customers would be a violation of the Communications Act.

Respectfully submitted,



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April 17, 2002

ATTORNEYS FOR
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CERTIFICATION

I, Joseph M. Sandri, Jr., hereby certify, under penalty of perjury, that to the best of my knowledge and belief, the factual assertions contained in the forgoing Petition for Emergency Declaratory Ruling of Winstar Communications, LLC are true and accurate.

Dated the 17th day of April, 2002.



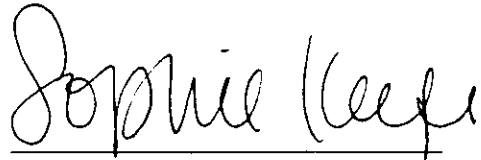
Joseph M. Sandri, Jr.
Senior Vice President and Regulatory Counsel
Winstar Communications, LLC

CERTIFICATE OF SERVICE

I, Sophie Keefer, hereby certify that on this 17th day of April, 2002, the foregoing "Emergency Petition for Declaratory Ruling of Winstar Communications, LLC" was served by hand on the following parties:

Melissa E. Newman
Vice President, Federal Regulatory
Qwest Communications, Inc.
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Richard T. Ellis
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A handwritten signature in black ink that reads "Sophie Keefer". The signature is written in a cursive, flowing style. The first name "Sophie" is larger and more prominent, with the last name "Keefer" written in a smaller, more compact script. The signature is positioned above a horizontal line.

Sophie Keefer

EXHIBIT 1